Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
The Commission's Horizontal and Vertical Ownership and Attribution Rules	)	MM Docket No. 92-264
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

REPLY COMMENTS OF COMCAST CORPORATION

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EXECUTIVE SUMMARY

The record in this proceeding does not demonstrate the need for restrictive ownership limits on the number of customers a cable operator may serve. Only a handful of parties advocate such limits in any substantive way, and they do not provide information and analysis that supports their position. Congress authorized subscriber limits on cable operators only to the extent needed to prevent unfair impediments to the flow of video programming to consumers, and judicial decisions curtail the Commission's discretion in crafting any such restraints. The record evidence in this proceeding makes clear that cable operators cannot impede the flow of video programming to consumers, now or in the future.

The MVPD marketplace is competitive. There is fierce competition – especially with DBS operators – in *every* market served by a cable operator, whether urban or rural. The Commission itself recognizes that "cable service has substitutes" in the local market and that it has been losing market share against these competitors year after year after year after year. Today, there are virtually no local markets where the cable operator does not, at a minimum, face two facilities-based DBS operators, each of whose "national footprint" offers "an effective alternative path" for video programming to reach subscribers. In addition to the two major DBS operators, there are numerous other facilities-based competitors to cable – including MMDS, SMATV, and cable overbuilders – as well as local broadcasters and national broadcast networks, all of which deliver video programming to consumers without interference from cable operators.

In all these respects (and others), the market has undergone massive changes since 1992. These changes ensure that cable operators cannot unfairly impede the flow of video programming to consumers.

Nor is there evidence that cable operators, even ones with significant numbers of customers, can exercise "monopsony" power in the purchase of video programming. To the contrary, there is a multitude of buyers in that market, including broadcast networks, other networks that are not affiliated with cable operators, local broadcasters, and facilities-based cable competitors. All of these entities can distribute video programming to consumers without any unfair interference by a cable operator. There is no "monopsony" in the market for the purchase of video programming.

As the capacity of the "electronic pathways" into every home continues to grow with additional investment by the cable, satellite, telephone, and broadcast industries (to say nothing of wireless and overbuilders), the flow of video programming to consumers will continue to expand. Comcast's five-billion-dollar-investment in plant upgrades is almost entirely complete. Any attempt to reduce the purchase of video programming below competitive levels would waste these investments. It would certainly make no sense when two DBS providers (and numerous other competitors) have the ability and incentive to immediately provide whatever programming consumers desire but cannot obtain from their cable company.

Remaining claims in support of strict ownership limits entirely miss the mark. The Consumer Federation of America et al. ("CFA") wrongly argues that the 1992 Act requires the Commission to impose a strict numerical ownership cap, but its argument for strict caps is not supported by the law or the record. Some commenters also seem to believe that government controls on ownership are needed to ensure that particular programming needs of consumers are satisfied, but the record shows there is a thriving marketplace of ideas, to which cable is a major contributor. For its part, Comcast is a leader in local programming, public affairs, and public service coverage. In the aggregate, today's marketplace delivers programming that exceeds all historical antecedents in quality, diversity, depth, attention to particularized interests, and the like.

In light of the foregoing, the Commission should retain its faith in the ability of the marketplace to respond to consumers through innovation and investment. There are clear and substantial public interest benefits to increased system ownership, including better service at lower costs to customers. Moreover, increased system ownership promotes the statutory objective of encouraging widespread deployment of innovative broadband services to all consumers by promoting economies of scale and scope. The Commission should be careful to weigh the harms it targets through ownership limitations against the substantial benefits associated with increased system ownership. In most cases, any such harms are more appropriately targeted through other existing rules.

If the Commission considers the evidence in light of the governing statute as interpreted by the D.C. Circuit, it will find that the case for strict ownership caps has not been made. Comcast does not take the position that the Commission cannot lawfully adopt any ownership rule. But the Commission must account for the highly competitive environment for the packaging and distribution of video programming to consumers. In light of the First Amendment rights of cable operators, the thriving competition among MVPD providers, the myriad ways in which programming can reach consumers without editorial interference by cable operators, and the innovation that scale and scope make possible, the record evidence supports – at most – only minimally restrictive rules. The record provides *no* evidence to support restoring the two attribution decisions that the Court of Appeals vacated.

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REPLY COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby responds to the comments filed on or about January 4, 2002, addressing issues relating to the ownership of cable systems.

INTRODUCTION

This proceeding seeks to determine the extent to which the number of subscribers a cable operator may reach, nationwide, must be limited to safeguard the flow of video programming to consumers. Comcast does not take the position that the Commission cannot lawfully adopt *any* such rule. For two important reasons, however, Comcast respectfully suggests that restrictive ownership limits like those that were invalidated by the Court of Appeals, and those that a limited number of parties persist in advocating, cannot lawfully be adopted:

- First, the record makes clear that there is fierce competition to distribute video programming, especially among facilities-based multichannel video programming distributors ("MVPDs") across the nation. In particular, *every* cable system faces competition from two strong, nationwide, facilities-based, high-capacity, all-digital Direct Broadcast Satellite ("DBS") systems.

- Second, the record shows that numerous facilities-based multichannel competitors, broadcasters, and other video programming networks unassociated with any cable system are already competing vigorously in program acquisition. There are literally hundreds of networks providing opportunities for creators of video programming to reach consumers, making it extremely difficult for cable operators (even if they were so inclined) to "unfairly impede the flow of video programming to consumers."

Notwithstanding the lack of record evidence showing competitive impediments to the flow of video programming to consumers, a small handful of substantive commenters argue that strict ownership limits on cable operators are necessary to regulate the content delivered to consumers in each local market. This argument not only raises a host of practical and legal complexities, but also lacks any solid factual support. Cable operators already provide some of the best public service programming available anywhere, and the market itself is especially sensitive to consumer preferences for programming and information. The record does not show how strict ownership limits would enhance the market's responsiveness to consumer preferences or survive judicial scrutiny.

Other "harms" certain commenters invoke to justify regulation create no nexus between the ownership of multiple cable systems by a single entity and an adverse effect on the flow of video programming to consumers. Even if the various unproven allegations about cable operator conduct, programming selections, and cable prices were assumed to be true – and in fact they are not – the record does not show that any such problems would be solved by limiting the number of cable systems a single cable operator may own. In short, proponents of strict ownership limits have failed to make their case.

The record is squarely to the contrary. Profound changes in marketplace circumstances have occurred since 1992, and the potential impediments to the flow of video programming are greatly reduced. Ten years ago, there were no facilities-based, all-digital multichannel video services competing with every cable operator. Now there are two, both with a nationwide reach, in addition to overbuilders in many major markets. Then, there were fewer than 100 video programming networks, and viewing was still dominated by three national broadcast networks. Today, there are almost 300 national networks plus scores of regional networks – with nearly 50 more networks in the planning stages – to serve the news, information, cultural and entertainment needs of viewers of every stratum. At the time of the Commission's first Report and Order in this docket, there were 40,000 DBS subscribers. Now there are over 400 times more – over sixteen million (16,000,000) – and DBS's growth not only remains rapid but also continues to far outpace cable's.

Competition from DBS operators, broadband service providers, incumbent local exchange carriers, broadcasters, and other programming vendors has radically changed the marketplace in which cable operators compete. Scale and scope economies are increasingly important (and will grow more so) to the development and delivery of next-generation cable and broadband services. A dynamic analysis is required to properly account for all of these changes. Moreover, the Commission must consider whether the harms it targets through ownership limitations are more appropriately addressed through other existing rules. While Comcast does not suggest the Commission lacks the authority to adopt any ownership rules, the current record falls far short of making the case for a restrictive ownership limit that can survive judicial scrutiny.

I. THE RECORD IN THIS PROCEEDING DOES NOT SUPPORT THE IMPOSITION OF RESTRICTIVE OWNERSHIP LIMITATIONS ON CABLE OPERATORS.

The record in this proceeding compels a recognition that Congress authorized so-called "horizontal" ownership limits only to the extent needed to prevent unfair impediments to the flow of video programming to consumers.[1] The horizontal ownership provisions of the 1992 Cable Act do not guarantee the success of any program producer, network, or distributor, nor are they intended to address every real or perceived grievance of the cable industry's critics or competitors. The Commission is right to stay focused on the purpose of this proceeding, as reflected in the relevant statutory provision.[2]

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[1] See, e.g., Comments of AT&T at 5 ("AT&T") (noting that "any limits must be reasonably tailored to address a demonstrated, non-conjectural risk of anticompetitive behavior [that] would give one or more large MSOs the ability and incentive to abuse market power over video programmers and thereby unfairly impede the flow of programming to consumers"); Comments of NCTA at 7 ("NCTA") ("The statutory language addresses only unfair impediments to the flow of programming"). Importantly, cable ownership limits do not address "horizontal" issues as those are understood in an antitrust context; the growth at issue here does not entail or imply any combination or absorption of competitors, because established cable operators generally do not compete with each other in local markets. Here, the term "horizontal" is simply a way of referring to geographic expansion.

[2] This proceeding addresses rules of general applicability, so this is not the forum to consider the proposed merger of Comcast and AT&T Broadband. But see Comments of CFA et al. at 6, 114, 115 ("CFA") (discussing Comcast/AT&T combination). Issues

This focus is particularly important because judicial decisions constrain the Commission's discretion in crafting horizontal ownership limits. There can no longer be a doubt that any such rules must respect important First Amendment values.[3] For this reason, care must be taken so that any rules are precisely calibrated to remedy concrete, non-speculative harms.[4] Yet the potential for such harms has been vastly reduced, if not eliminated altogether, by the dramatic marketplace changes that have occurred since the Cable Act of 1992 was enacted.[5]

The record evidence does not show that cable operators can impede the flow of video programming to consumers, now or in the future. Today, outlets for video

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pertaining to the merger will be fully addressed when the appropriate transfer applications are filed.

[3] See Time Warner Entertainment Co., L.P. v. Federal Communications Commission, 240 F.3d 1126 (D.C. Cir. 2001) ("Time Warner II"); see also Leathers v. Medlock, 499 U.S. 439, 444 (1991); Turner Broadcasting System, Inc. v. United States, 512 U.S. 622, 636 (1994); Turner Broadcasting System, Inc. v. United States, 520 U.S. 180 (1997).

[4] See AT&T at 29 ("subscriber limits can be imposed only if, and only to the extent that, record evidence demonstrates that cable operators would otherwise acquire and abuse market power over video programmers"); Comments of Time Warner at 9 ("TW") (discussing D.C. Circuit's requirement of "a record supporting a non-conjectural risk of anticompetitive behavior"); NCTA at 7 (same).

[5] See AT&T at 16 ("The video programming marketplace has, by any measure, undergone dramatic and highly relevant changes in the decade since passage of the 1992 Cable Act"); NCTA at 6 ("Changed circumstances have substantially diminished the ability and incentive of cable operators, regardless of their size, to suppress the flow or diversity of programming available to television viewers"); Comments of The Progress and Freedom Foundation at 12 ("PFF") (discussing developing MVPD competition and cautioning that "an industry subject to rapid and unpredictable change, particularly one driven by technological innovation, is not one in which market structures and firm organizations should be dictated by overly restrictive rigid rules"); TW at 10, 13 (discussing evolution of DBS and other MVPDs). The Commission's annual reports on the state of competition in video programming provide irrefutable evidence in this regard. See generally Annual Assessment of the Status of Competition in the Market for the

programming include no fewer than two successful and well financed DBS systems, seven nationwide over-the-air broadcast networks, almost three hundred national programming networks, dozens of regional networks, and dozens of planned new networks.[6] Responding to competition from DBS providers and other sources, cable operators have been expanding their channel capacity.[7] Terrestrial broadcasters are adding channels (and therefore require additional programming) as they convert to digital.

Moreover, tremendous investments are required to enable Comcast, other cable operators, and other competitors to fulfill consumer demands for new services and enhancements to existing ones.[8] The benefit of any limits on cable operators' geographic extension must be weighed carefully against the likelihood that such limits would impede

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Delivery of Video Programming, Eighth Annual Report, CS Docket No. 01-129 (2002) ("Eighth Annual Video Competition Report").

[6] See, e.g., AT&T at 16, 22 (discussing the profusion of non-cable programming outlets); NCTA at 10 (discussing the decline of vertical integration and the increase in overall number of programming networks). See also Eighth Annual Video Competition Report, CS Docket No. 01-129 at Tables D-1 and D-2 (National Programming Networks), D-3 (Regional Programming Networks), D-4 (Planned Programming Services).

[7] See Comments of Comcast at 30 ("Comcast") (discussing Comcast's recent investment in cable plant upgrades resulting in 95% availability of digital tier to subscribers); Comments of Cablevision at 9 ("Cablevision") ("channel capacity has expanded significantly in the last decade").

[8] See AT&T at 24 ("Cable operators have likewise significantly upgraded capacity – at a cost of over 52 billion dollars – thereby increasing greatly the number of programming networks they need to fill their channel line ups"); NCTA at 11 ("The average cable subscriber's system now provides approximately 90 channels of video programming, and the number continues to grow as more systems upgrade to 750 MHz of capacity"). Capacity, of course, will never be infinite, and numerous innovative offerings other than the delivery of video programming will require bandwidth. Still, the menu of viewing choices available to consumers is long and growing longer.

new investment and innovation and curtail the competition that has already brought so many benefits to consumers.[9]

As further explained below, the small number of substantive commenters who advocate restrictive ownership caps have failed to show that there is, or could be, a relevant cable "monopoly" or "monopsony." In fact, the comments prove the contrary: over the past decade, there has been a vast expansion in the number of outlets available for video programming to reach consumers.[10] The record does not show how any cable operator – or cable operators in combination – could unfairly impede the flow of video programming to consumers in this market. Nor does the record show why any cable operator would wish to impede the flow of programming, even if it could. Instead, the record reveals that cable operators deserve a healthy measure of credit for *enabling* the vast growth in the number of video programming networks and *expanding* their availability to consumers over the past decade.

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[9] Congress was careful to remind the Commission that part of its duty under Section 613 is to "*account for any efficiencies and other benefits that might be gained through increased ownership or control*" and "make such rules and regulations *reflect the dynamic nature of the communications marketplace*." 47 U.S.C. §§ 533 (f)(2)(D) & (E) (emphasis added).

[10] See, e.g., NCTA at 10 ("as the percentage of non-vertically integrated programming services has sharply increased, so have the number of channels offered by cable systems and the overall number of programming services available"); AT&T at 25 ("By any measure, the growth in the supply and diversity of video programming has been truly explosive"); TW at 13 ("As the FNPRM acknowledges, channel capacity has grown massively in recent years, which has further facilitated entry by new video programming services").

II. CABLE OPERATORS POSE NO UNFAIR IMPEDIMENTS TO THE FLOW OF VIDEO PROGRAMMING TO CONSUMERS.

The record does not show why restrictive cable ownership limits might be necessary to ensure the flow of video programming to consumers. From the consumer's perspective, there are many ways in which video programming reaches the home.[11] Focusing on the distribution of video programming (Market 3), the record refutes claims of a cable "monopoly." There is fierce competition – especially with the two nationwide DBS operators – in *every* market served by a cable operator, whether urban or rural. DBS operators are taking significant market share from cable. Today, the cost of switching from cable to DBS in many cases has gone down to zero or virtually zero. Focusing on the acquisition of content (Market 2), there is no evidence of cable "monopsony" power. To the contrary, the buyers of video programming are legion; most are not subject to any editorial oversight by cable system operators. As the capacity of the electronic pathways into every home continues to expand with additional investment by the cable, satellite, telephone, and broadcast industries (to say nothing of wireless and

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[11] The FNPRM proposed three distinct "markets" to be analyzed: video program production ("Market 1"), video program packaging ("Market 2") and video program distribution ("Market 3"). Further Notice Of Proposed Rulemaking, FCC 01-263, at 10 ¶¶ 9, 10, and at 13 ¶ 18 (rel. Sept. 21, 2001) ("Further Notice" or "FNPRM"). In its initial comments, Comcast demonstrated that, from the perspective of the consumer – whose interest is in video programs and not in "networks" or "delivery media" – video programming *packagers* and multi-channel video programming *distributors* generally collapse into a single market. See Comcast at 19. For purposes of setting horizontal ownership limitations, there is no basis for the Commission to distinguish between the ability of a program producer to sell that programming to a packager (Market 2) or a distributor (Market 3), since both are outlets that can convey the programming to consumers. The differences between them only matter if the Commission seeks to guarantee success for or re-distribute profits among the middlemen, neither of which objective is authorized or contemplated by the statute.

overbuilders), the flow of video programming to consumers will only continue to increase. There is no basis in the record to show that geographic expansion by a cable operator will unfairly impede the flow of video programming to consumers.

A. Cable Operators Do Not Have "Monopoly" Power To Impede The Flow Of Video Programming To Consumers In Local Markets.

The record in this proceeding does not support those who claim that a cable "monopoly" unfairly impedes the flow of video programming to consumers.[12] The Commission itself recognizes that "cable service has substitutes"[13] in the local market. As the Commission has recognized, cable has lost significant market share against these

[12] See CFA at 17, 19 ("local monopoly power is the cornerstone of cable market power…[a]s concentration increases, so does the ability to do harm"). To the contrary, there is ample evidence of competition in local markets for the delivery of video programming to consumers. See AT&T at 16 ("today, video programming is distributed worldwide by cable, broadcasting, DBS, C-band satellite, MMDS, SMATV, cable overbuilders, and, soon, terrestrially delivered MMVDS") (MMVDS is microwave multichannel video distribution); NCTA at 8, 12 ("DBS – which had not even been launched in 1992 – now offers two competitive alternatives nationwide, in addition to cable's other terrestrial competitors . . . largely but not only because of the ubiquitous nationwide availability of two DBS providers, virtually all cable subscribers now have choices among comparable multichannel services at comparable prices"); PFF at 7 (discussing the rise of MVPD competition and citing Commission findings re same); TW at 10 ("DBS and other MVPDs are now much more powerful competitors to cable operators than at any time when the Commission previously considered subscriber limits"). For its part, Comcast competes not only with DirecTV and EchoStar but also with RCN in the Washington, D.C. (d/b/a "Starpower") and Philadelphia markets, with Knology in southern markets, and with WideOpenWest, Western Integrated Networks, Everest Communications, Carolina Broadband and Grande Communications in other markets.

[13] Statistical Report on Average Rates For Basic Service, Cable Programming Services, and Equipment, Report On Cable Industry Prices, 16 FCC Rcd 4346, 4364 ¶ 48 (2001) ("2001 Report on Cable Prices"). Most importantly, "DBS is a substitute for cable services." Id. at 4365 ¶ 53. CFA misses this point, and tries in vain to wish DBS away. See, e.g., CFA at 36 ("We find very clear evidence that . . . cable and satellite represent distinct . . . markets").

competitors every year, without exception, since 1996.[14] Although there are some significant areas where DBS faces no competition from cable, every cable operator in the continental United States and Alaska faces, at a minimum, two facilities-based DBS operators, each of whose "national footprint" offers "an effective alternative path" for video programming to reach subscribers.[15] And, in addition to DBS, there are numerous other facilities-based competitors to cable, including MMDS, SMATV, and cable overbuilders.[16]

1. Cable Faces Competition In Every Local Market.

Cable operators nationwide face competition from an array of formidable players. With their nationwide reach, aggressive advertising and marketing, and wide array of

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[14] Cable's declining market share has been discussed in each of the Commission's Video Competition Reports since 1997. See Eighth Annual Video Competition Report, CS Docket No. 01-129 at 4 ¶ 5; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report, 16 FCC Rcd 6005, 6009 ¶ 5 (2001) ("Seventh Annual Video Competition Report"); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Sixth Annual Report, 15 FCC Rcd 978, 982 ¶ 5 (2000) ("Sixth Annual Video Competition Report"); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fifth Annual Report, 13 FCC Rcd 24284, 24288 ¶ 6 (1998) ("Fifth Annual Video Competition Report"); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fourth Annual Report, 13 FCC Rcd 1034, 1039 ¶ 7 (1997) ("Fourth Annual Video Competition Report"); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report, 12 FCC Rcd 4358, 4362 ¶ 4 (1997) ("Third Annual Video Competition Report").

[15] Further Notice of Proposed Rulemaking at 15 ¶ 22. As pointed out by the American Cable Association in its Petition to Deny the merger application of Echostar and Hughes, DBS competition has been so fierce, and cable subscriber losses so extreme, as to push some smaller-market cable operators over the edge into bankruptcy. See American Cable Association Petition to Deny, CS Docket No. 01-348, at 21 (February 4, 2002).

[16] See note 12, supra.

service offerings, DBS providers are the most significant competitors.[17] Competing in every local market, DBS providers enjoy numerous advantages over cable, including all-digital technology, greater channel capacity, and lower regulatory costs.[18] Today, DBS providers are among the largest MVPDs,[19] but they have reached this stage after only seven years – a remarkable accomplishment compared to any cable operator.[20] DBS providers continue to grow faster than their competitors, last year alone growing twelve

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[17] DirecTV boasts that "[a]ll geographic areas in the continental U.S., including those areas not passed by cable, are served by DBS operators using satellites at CONUS orbital locations. Thus, nearly every television household in the continental U.S. and much of Alaska is able to receive DirecTV programming if the consumer purchases the DirecTV system and installs it within the proper line of sight." <u>Comments of DirecTV, Inc.</u>, CS Docket No. 01-129, at 10 (August 3, 2001).

[18] <u>See</u> <u>AT&T</u> at 21 ("DBS enjoys a number of competitive advantages, including digital technology that gives it greater channel capacity than many cable systems. In addition, DBS operators are not subject to the local franchise fees and taxes that add significantly to cable customers' monthly bills, and are not saddled with the costs of public access studios, institutional networks, and free municipal cable hook-ups which are required by most cable franchise agreements").

[19] DirecTV now has more subscribers nationwide than all but two cable operators, AT&T Broadband and AOL Time Warner, while only five cable companies have more customers than Dish Network. Currently, DirecTV serves over 10 million subscribers; EchoStar serves over 6 million. <u>See</u> <u>Eighth Annual Video Competition Report</u>, CS Docket No. 01-129, at 29 ¶ 57; <u>see</u> <u>also</u> http://skyreport.com/dth_us.htm. Pegasus Communications, a reseller of DBS programming, currently serves over 1.5 million subscribers, <u>see</u> http://www.pgtv.com/default.asp?flash=true. Thus, even if preserving an "open field" of 15 million subscribers could be deemed an essential objective under the 1992 Act, DBS operators alone already provide this opportunity.

[20] <u>See</u> <u>TW</u> at 10 ("DBS operators currently have more than 17.2 million U.S. subscribers, accounting for almost 20 percent of the national MVPD subscriber universe. All of those subscribers were signed up in just seven years – since June 1994, when DirecTV began offering service") (citing SkyREPORT, <u>National DTH Counts</u>, http://www.skyreport.com/dth_us.htm). By contrast, it took the cable industry almost *thirty years* to attract 20% (14 million) of television households. For a discussion of cable's early history, <u>see</u> Stanley M. Besen and Robert W. Crandall, <u>The Deregulation of Cable Television</u>, 44 L. & Contemp. Probs. 77 (1981).

times faster than the cable industry.[21] Considering their strong presence in urban markets, they are clearly not "rural" or "niche market player[s]"[22] but mature, full-fledged competitors.

Claims that DBS does not compete with cable[23] are at odds not only with the Commission's own findings but also with the record evidence in this proceeding. The Consumer Federation of America, et al. ("CFA") itself concedes that sixty percent of all DBS customers are in areas served by cable operators.[24] Moreover, AT&T points out that DBS is adding customers at the expense of cable, as almost half of all current DBS customers are former cable customers.[25] DBS providers advertise themselves as a "full replacement to cable."[26] They promote their delivery of all the local broadcast channels to compete with cable.[27] They compete aggressively on price and offer numerous

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[21] Eighth Annual Video Competition Report, CS Docket No. 01-129, at 6 ¶ 13.

[22] See CFA at 147 ("satellite is restricted to two niches – a rural niche and a mega-service niche"), 152 (satellite is a "niche market player" that is "simply not an effective competitor for the vast majority of cable subscribers"); 155 (dismissing satellite as merely "filling a niche").

[23] See CFA at 156 (DirecTV "eschews price competition for the basic package"), 167-70 (arguing that pricing difference shows cable and satellite are "different products").

[24] CFA at 158. As a matter of fact, "[i]n general, DirecTV subscribers are distributed evenly across the continental United States." Comments of DirecTV, CS Docket No. 01-129, at 13 (August 3, 2001).

[25] AT&T at 19 (citing J.D. Power & Assocs., 2001 Syndicated Cable/Satellite TV Customer Satisfaction Study, at 79 (Sept. 2001)); See also Comments of DirecTV, Inc., CS Docket No. 01-129 at 11 (August 3, 2001); Comments of DirecTV, Inc., CS Docket No. 00-132, at 11 (Sept. 8, 2000).

[26] DirecTV Press Release, "More Than 200 Additional Local Channels Now Available to DirecTV Customers in 41 Markets," Dec. 27, 2001 (DirecTV President and COO claims company offers "true cable replacement").

packages for every type of interest.[28] They tell consumers that it "costs nothing to switch from cable."[29] They advertise their exclusive programming.[30] They and their major national retail partners -- such as Circuit City, Best Buy, and Radio Shack -- have a nearly ubiquitous presence in urban and rural markets, on billboards, at sports venues, in print media, through direct mail, and over television and radio. While DBS was once a high-end service, requiring expensive customer-premises equipment,[31] DBS today demonstrates powerful mass-market appeal.

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[27] Id. The Commission correctly recognizes the importance of the Satellite Home Viewer Improvement Act ("SHVIA"), Pub. L. No. 106-113, 113 Stat. 1501 (1999) (codified at 47 U.S.C. § 338, "Carriage of Local Television Signals by Satellite Carrier"), upheld upon review in Satellite Broadcasting and Communications Assoc. v. FCC, 146 F.Supp. 2d 803 (E.D.Va. 2001), aff'd, 2001 U.S. App. LEXIS 26120, __ F.3d __ (4th Cir. 2001). By facilitating DBS delivery of local television broadcast signals, this statute allowed DBS to "more closely match [the] services provided by cable operators," and thus compete more effectively. 2001 Report on Cable Prices, 16 FCC Rcd at 4365 ¶ 53. Tellingly, there is not a single mention of the SHVIA in CFA's comments.

[28] See "3 Months Free-Up to 4 TVs," Dish Network offer of free delivery, installation on up to four televisions, and three months of programming all for $49.95 (available at http://www.dishnetwork.com/content/getdish/new.shtml). For its part, DirecTV offers packages starting at $31.99 per month for over 100 digital channels. See www.directv.com. But see CFA at 156 ("DBS still costs more than twice as much as cable").

[29] "Getting DirecTV service is as easy as 1, 2, free." DirecTV Promotional Flyer (attached hereto at Exhibit A) (free DirecTV system, free standard installation, free six months of Showtime, and programming package starting at $31.99 per month); "For Less Than Fifty Bucks You Can Get Satellite TV Installed in 4 Rooms—Or You Can Blow It on One More Month of Cable." Dish Network advertisement, Washington Post, February 7, 2002 (also attached hereto at Exhibit A). But see CFA at 155 (claims DBS still has "high front-end costs").

[30] According to DirecTV, NFL Sunday Ticket and DirecTV Freeview Events are available only to DirecTV subscribers. See http://www.directtv.com/ programming /programmingpages/0,1093,161,00.html.

[31] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Annual Report, 9 FCC Rcd. 7442, 7475 (1994) (DBS customers required to pay $699 for home receiving equipment, plus another $150-200 for

2. Competition Constrains The Behavior Of Cable Operators.

It is not necessary for every household to be able to subscribe to satellite service in order for competition to be real.[32] Certainly, some households cannot utilize DBS service due to physical constraints. Still, DBS operators represent they can serve "[a]ll geographic areas in the continental U.S." and "nearly every television household" in the country.[33] With their national platforms, DBS services reach every local "market" served by cable operators, even if not every "household" is contested.[34] By competing for neighboring customers in each local market and by competing at the program "buyer" level with every cable operator, DBS providers ensure that a competitive market benefits all consumers.[35]

Thus, whether or not DBS service can find a way into every single home is beside the point. What matters here is that the availability of DBS clearly disciplines cable

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professional installation; those who wished to view two different channels on two different television sets were required to purchase both an $899 DSS unit and an additional $649 decoder for the second television set).

[32] In the Commission's recent program access proceeding, both Echostar and DirecTV reaffirmed that they have developed into full competitors with cable. Echostar argued that the lack of product differentiation between DBS service and cable encourages price competition, see Comments of Echostar Satellite Corporation, CS Docket No. 01-290 at 7 (December 3, 2001), while DirecTV argued that its own exclusive offerings encourage competition for non-price aspects of service, see Comments of DirecTV, CS Docket No. 01-290 at 6, 7 (December 3, 2001). These two views may be at variance with one another, but they are both consistent with a recognition of competition.

[33] See Comments of DirecTV, Inc., CS Docket No. 01-129, at 10 (August 3, 2001).

[34] See Time Warner II, 240 F.3d at 1134 (DBS "could be considered to pass every home") (quoting Third Annual Video Competition Report, 12 FCC Rcd at 4371 ¶ 20).

[35] As Time Warner puts it, cable customers who cannot receive DBS service are "randomly dispersed among subscribers who *can* switch to DBS. Thus there is no practical way in which [a cable operator] can discriminate against them; if [the operator decides] not to carry a particular service, it is unavailable to all subscribers." TW at 12.

operators' behavior in every local market. Even assuming for the sake of argument that a cable operator would consider attempting to create "unfair impediments to the flow of video programming to consumers," that operator would inevitably recognize that doing so would only increase the relative appeal to consumers of DBS service – or some other competitor.[36] Even CFA acknowledges that two-thirds of new DirecTV customers are from urban areas, presumably served by cable.[37] Thus, the threat of lost customers is real and "highly relevant"[38] for any cable operator considering unfair behavior. It certainly vitiates the claim that DBS is not relevant because not every household can or currently does subscribe.

3. DBS Operators Provide Alternative Platforms For Video Programming.

CFA's claim that cable is not facing competition in local markets relies heavily on erroneous assertions regarding cable service prices.[39] Putting aside CFA's hyperbole,

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36 See FNPRM at 15 ¶ 22 ("[T]he competitive presence of DBS reduces cable operators' incentives to choose programming for reasons other than quality because a cable operator that selects programming on some other basis risks loss of subscribers if high quality programming is available via DBS"). Accord Time Warner II, 240 F.3d at 1134 ("A company's ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the availability of competition"). See also NCTA at 14 ("What this means is that a cable operator that refuses to carry attractive programming services may now, in addition to failing to attract new subscribers and failing to maximize revenues from existing subscribers, lose existing subscribers to competitors").

37 CFA at 159-160.

38 See Declaration of Janusz A. Ordover, attachment to Comments of AT&T, at 54 ¶ 104 ("Ordover").

39 See, e.g., CFA at 6 (cable prices "continue to skyrocket, exceeding the rate of inflation by leaps and bounds"). In fact, cable prices have not risen much faster than the rate of inflation over the past two years. See Eighth Annual Video Competition Report, CS Docket No. 01-129 at 5 ¶ 9 ("between June 2000 and June 2001, cable prices rose 4.24 percent compared to a 3.25 percent increase in the Consumer Price Index ('CPI'),

this approach focuses on the wrong issue.[40] There are in fact many ways in which "competition" takes place, and price is only one of them.[41] Moreover, in the context of this proceeding, the important inquiry for the Commission is the *extent to which DBS providers serve as alternative platforms for video programming to reach consumers*. The evidence in this regard is compelling. The DBS industry itself believes that the sources of programming available to it are plentiful; indeed, the available supply exceeds even the considerable existing capacity of DBS systems.[42] The recent investment by Vivendi-

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which measures general price changes"); Seventh Annual Video Competition Report, 16 FCC Rcd at 6009 ¶ 9 (between June 1999 and June 2000, cable rates exceeded inflation by 1.6%). These increases do not take into account increased numbers of channels made available to consumers. In its 2001 Report on Cable Prices, 16 FCC Rcd at 4349, the Commission found that average cable rates on a per-channel basis remained flat in 2000.

[40] There are a number of factors that contribute to pricing of video programming services, including the cost of the programming itself, the costs associated with the facilities, the condition of facilities acquired from another system owner, and the nature of other services sold to the customer. The most significant reasons for price increases are programming costs and investments in new cable infrastructure.

Cable operators' programming costs have risen much more than cable prices. Programming costs (in terms of licensing fees paid for programming) for cable operators rose 16% from 1999 to 2000, from $5.5 billion to $6.4 billion. See Eighth Annual Video Competition Report, CS Docket No. 01-129 at 13 ¶ 22; Seventh Annual Video Competition Report, 16 FCC Rcd at 6020 ¶ 24. Investment in upgraded facilities also leads to higher costs, but these expenditures benefit subscribers through better service quality and expanded channel capacity. Cable operators' investment in physical plant upgrades increased 45% from 1999 to 2000. Eighth Annual Video Competition Report, CS Docket No. 01-129 at 17 ¶ 32.

[41] See, e.g., Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Sixth Report, FCC 01-92, at 4-5, 11 (2001); Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Fifth Report, FCC 00-289, at 4 (2000) (even in the market for minutes of wireless telephone use, the Commission looks beyond "price" to other factors to assess the level of competition).

[42] See Memorandum in Support of Plaintiff's Motion for Summary Judgment as to First Amendment Issues at 2, Satellite Broadcasting and Communications Assoc. v. FCC, 146

Universal in EchoStar confirms the importance of DBS as a distribution platform.[43] MGM's recent talks with EchoStar over the creation of an MGM-branded network solidify this conclusion.[44] There can be no doubt that the D.C. Circuit was correct to direct the Commission on remand to adopt a dynamic view of the market that "take[s] account of the impact of DBS."[45]

Largely as a direct result of pressure from DBS and other competitors, cable operators have invested fifty-five billion dollars to date[46] to expand their channel capacity, add digitally delivered signals, and upgrade their service offerings to consumers.[47] The fact is, DBS operators compete with cable not only in terms of price and convenience but also in their ability to offer digital quality and exclusive programming to distinguish themselves from cable and attract more customers.[48]

F. Supp. 2d 803 (E.D. VA 2001) (No. 00-1571) ("Satellite carriers must choose from approximately 300 national cable channels, numerous specialty sports, and regional video channels, pay-per-view offerings, music channels, and other programming services") (motion dated June 19, 2001).

[43] See Seth Schiesel, Vivendi Is Said To Have Deal For Expansion In U.S. Media, N.Y. Times, Dec. 17, 2001 at p. 16.

[44] See Nicole Sperling, MGM Reportedly on Block, The Hollywood Reporter, January 16, 2001.

[45] Time Warner II, 240 F.3d at 1134.

[46] See NCTA, Cable and Telecommunications Industry Overview 2001, available at http://www.ncta.com, at 14 (Dec. 11, 2001) ("NCTA 2001 Overview").

[47] An aggressive program of capital investment has made it possible for Comcast to upgrade 95% of its systems, thereby making available digital tiers that offer nearly 200 channels of video programming. See Comcast at 30.

[48] Contrary to CFA's claims, with seven years and over sixteen million subscribers under its belt, DBS is plainly not a "nascent phenomenon." CFA at 10.

DirecTV offers exclusive programming packages.[49] DirecTV's N.F.L. package "remains one of the service's cornerstones because it attracts subscribers who end up paying for more profitable programming."[50] In addition, through its "DirecTV Freeview" event series, DirecTV exclusively offers concerts by numerous popular recording artists.[51] Recently, DirecTV announced December as "U2 month exclusively on DIRECTV," during which the company premiered an "exclusive U2 television event [that included] a concert film of the band's sold-out Elevation Tour 2001, recorded live in Boston."[52] The company stated that these events were indicative of DirecTV's "mission to . . . deliver exclusive features not available on any other multi-channel service."[53] For its part, EchoStar offers at least three program packages exclusively.[54] EchoStar markets

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49 See, e.g., http://www.directtv.com/programming/programmingpages/0,1093,86,00.htm ("DirecTV is the only service that gives you access to every major pro sports subscription from the NFL, NBA, MLB, MLS and WNBA, plus college football and basketball"); http://ww.directv.com/programming/programmingpages/0,1093,501,00.html ("Each month, DirecTV delivers select exclusive events to our customers for FREE!"). "In this regard, the *Notice* correctly cites DirecTV's exclusive arrangement with the National Football League as an example of an exclusive agreement that has been 'credited with attracting a significant number of subscribers to DirecTV's service'…the agreement has been an important way for DirecTV to distinguish itself in the MVPD market." Comments of DirecTV, CS Docket No. 01-290, at 7 (Dec. 3, 2001).

50 Seth Schiesel, Football Fans With Cable Hope To Have Wider Choice, N.Y. Times, Jan. 28, 2002.

51 These have included Sting, Paul McCartney, The Who, Randy Travis, Wynnona Judd, Yes, Barry Manilow, Peter Frampton, Neil Young, David Gray, Journey, Psychedelic Furs, Sugar Ray and the Go-Gos. See http://directtv.com/press/pressdel/.

52 Press Release, "December is U2 Month Exclusively on DIRECTV, Sold-Out U2 Elevation Tour 2001, Plus Additional U2 Programming to be Broadcast Free of Charge," November 28, 2001, available at http://biz.yahoo.com/prnews011128/law049a_1.html.

53 Id.

54 EchoStar is the only MVPD offering Russian State Television (ORT), the Israeli Network, and the South Asia Channels, which include Zee TV, TV Asia, Sony

these programming packages as being available "exclusively on Dish Network"[55] and has taken court action to enforce its exclusive rights.[56]

By contrast, Comcast does not have the same ability to make such offers in the cable television business. The only national satellite programming that is exclusive to Comcast in its local franchise areas is GoodLife TV, and that is only exclusive with respect to terrestrial MVPDs.[57] Comcast has no objection to its competitors' use of exclusive programming to distinguish themselves, although a cable operator's inability to do so seems unfair in today's market.[58] Still, the fact that different competitors offer intentionally different bundles of service is a sign that competition is working, not that it is broken.[59] Indeed, CFA itself argues that "satellite customers are more satisfied than

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Entertainment Television Asia, B4U, and Z Gold. See http://www.dishnetwork.com/content/programming/packages/index.shtml.

[55] See, e.g., http://www.kbs-tv.com/dev/israeli_main.html; http://www.kbs-tv.com/dev/main.html.

[56] New Jersey Court Issues Injunctive Relief To EchoStar Subsidiary NRT America; Court Orders TV Russian Network TVR to Stop Use of ORT and TV-6 Russian Language Programming, Business Wire, July 17, 2001, available at http://www.kbs-tv.com/dev/pressrelease2.html.

[57] Comcast also has a terrestrially delivered regional sports programming service, which it makes available to its terrestrial (wireline and wireless) competitors but not to DBS operators, an arrangement that is fully consistent with the Commission's rules. See DirecTV, Inc. v. Comcast Corp., 15 FCC Rcd 22802 at 22807 ¶¶ 11-12 (2000) ("DirecTV v. Comcast"), appeal pending sub nom Echostar Communications Corp. v. FCC, No.01-1032 (D.C. Circuit, filed January 19, 2001).

[58] Comcast has accordingly urged the Commission to permit the prohibition of exclusivity for vertically integrated, satellite-delivered programming to sunset, as scheduled, in October of this year. See Comments of Comcast Corporation, CS Docket No. 01-290 (December 4, 2001).

[59] CFA's allegation that "bundling" services denies customers choices is unfounded and misleading. See CFA at 9. In fact, Comcast pioneered "skinny basic" and other program service tiers that afford consumers a great deal of flexibility to select programming of interest to them. See Comments of Comcast Corporation, CS Docket No. 01-129, at 5

are cable customers" with their service.[60] Regardless of whether this is true, it only underscores the reality of competition.

For all of these reasons, concerns about whether a "monopoly MVPD [might] provide fewer choices among similar types of programming and charge higher prices than competitive MVPDs" are not well grounded.[61] The record confirms the Commission's finding that cable systems are not monopoly MVPDs.[62] Moreover, programming choices are driven by the extent and nature of *local* competition, not the patterns of national system ownership.

B. There Are More Outlets For Video Programming Than Ever Before.

The record in this proceeding does not support concerns that cable "monopsony" power could unfairly impede the flow of video programming to consumers. Numerous commenters demonstrate that, in addition to facilities-based competitors to cable (Market 3), broadcast networks and non-cable affiliated networks (Market 2) ensure the availability of alternative pathways for video programming to reach consumers independent of cable operator influence or control.[63] Through their affiliates, broadcast

(September 5, 2001). In any case, offering service packages is a recognized, pro-competitive strategy that enhances convenience, expands choice and lowers prices for consumers. Id.

[60] CFA at 163.

[61] FNPRM at 19 ¶ 35.

[62] See id. at 15 ¶ 22 ("Perhaps the most important difference between the industry in 1992 and today is that in 1992 there was no clear nationwide substitute for cable").

[63] See AT&T at 16; NCTA at 11; TW at 17; PFF at 12. Under these circumstances, CFA's claim that the "overall competitive situation is worse than in 1992," CFA at 9, is not credible. There are many more programs (Market 1) and many more networks (Market 2). There is much more MVPD competition (Market 3). And there are many

networks are guaranteed carriage on cable (and as a practical matter also on DBS), and "must-have" non-broadcast programming networks are virtually assured carriage. As the capacity of distribution paths continues to expand, the threat that any "buyer" could credibly reduce purchases simply diminishes further. Accordingly, there is little if any risk that a cable operator – or any group of cable operators[64] – could unfairly impede the flow of video programming to the home. Concerns about "monopsony" in the market for the purchase of video programming are unfounded.

1. "Must-Have" Programming Networks Further Undercut The Possibility Of Cable "Monopsony."

There is no record evidence that a cable operator of a certain size could exercise monopsony power in the acquisition of video programming. This is true because there are too many other buyers of video programming who are guaranteed – or virtually assured – carriage into nearly every home in the country. CFA argues that cable operators "can make or break programming" because they "contro[l] a substantial

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more channels of video programming available to the typical MVPD subscriber. All of these developments are consistent with the goals of policymakers.

In addition to the competitors mentioned above, it must be noted that producers of video programming have other sales outlets, including DVD and VHS and burgeoning overseas markets. "Foreign video programming distributors also purchase vast amounts of video programming, and foreign sales are now a substantial portion of many programming networks' business. For example, MTV reaches 370 million households in 140 countries…U.S. cable operators represent less than a quarter of the 317 million worldwide cable and DBS subscribers." AT&T at 23; see also Ordover at 29 ¶ 58.

[64] As discussed by NCTA in its comments, see NCTA at 18, the D.C. Circuit restricted the FCC's ability to consider the possibility of collusion except upon evidence of collusion or reason to suspect potential collusion on the record. No such evidence has been adduced here.

number of eyeballs."[65] But these allegations are belied by the record evidence and in no event rise to a showing of "monopsony" power.

To begin, broadcast networks are major buyers of video programming, and continue to reach the largest nationwide audiences.[66] ABC, CBS and NBC alone account for thirty to thirty-six percent of television prime viewing time, and the six advertiser-supported broadcast networks together account for more than half of total prime viewing time, even when compared to *all* non-broadcast networks as a group.[67] That viewership translates into purchasing power, and broadcasters accordingly retain a formidable ability to deliver video programming to viewers.

Importantly, DBS companies now provide additional paths for this programming as well. The Satellite Home Viewer Improvement Act's "carry one, carry all" rule ensures that even relatively "weak" broadcasters can obtain compulsory access to DBS in markets where DBS carries any local channels, and the national networks have long been carried in any event.[68] These far-reaching distribution paths afford program producers that sell to broadcast networks an opportunity to reach homes without any interference by

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65 CFA at 107.

66 Almost every week, every single show garnering a top-ten Nielsen rating appears either on NBC, ABC, CBS, or Fox. See, e.g., Broadcasting & Cable, January 29, 2001 (Nielsen ratings for week of January 21 to January 27, 2002).

67 See Kagan Broadband Advertising, Dec. 13, 2001 at p.9. See also Eighth Annual Video Competition Report, CS Docket No. 01-129 at 39 ¶ 80 ("During the 2000-2001 television season, ABC, CBS, Fox, NBC, PAX, UPN, and WB affiliates accounted for a combined average 57 percent share of prime time viewing among all television households").

68 See AT&T at 33. It bears repetition that CFA never mentions the SHVIA, despite more than two hundred pages of comments.

cable,[69] in addition to the opportunities resulting from broadcasters' must-carry rights and their ability to deliver their signals directly over the public airwaves. Thus, broadcast networks alone seriously undermine the prospects for cable "monopsony" power.

In addition to traditional broadcast networks, numerous other "must-have" non-broadcast programming networks – and scores of additional networks that cable operators choose to carry because they must do so to keep their customers satisfied, given the alternative of at least two other MVPDs with enormous program line-ups – provide additional outlets for video programming.[70] Major broadcast companies are increasing their ownership of non-broadcast networks. Each of the major commercial broadcast TV networks today is owned by a media company that has financial interests in ten to twenty "cable networks." These include nationally distributed channels like CNBC as well as regional channels like Fox Sports Net and some of the most powerful brands in television, such as ESPN, The Disney Channel, MTV, VH-1, Nickelodeon, Lifetime, the History Channel, and Showtime networks.

While concerns that a large cable MSO could possibly have wielded monopsony power might have been understandable in 1991, they are out of date today. In 1991,

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[69] See Ordover at 28 ¶ 56.

[70] See AT&T at 33 (discussing how, if a cable operator were to refuse to carry a high-demand network, competitors such as DBS would immediately exploit that lack of essential programming); TW at 12 ("Assuming that cable operators could ever have profitably denied carriage to video programming services for anticompetitive reasons, the universal availability of DBS and other MVPDs has eliminated that ability"); NCTA at 12 ("Today, the costs of discriminating against an attractive but unaffiliated program service have sharply increased while the benefits have diminished"). The total number of video programming networks has increased dramatically. Eighth Annual Video Competition Report, CS Docket No. 01-129 at 66 ¶ 157. On top of these, there are eighty

Congress was concerned with MSOs' ability to "extract concessions from programmers who desperately need to reach a large audience" since cable operators owned at least half of the cable programming networks.[71] But vertical integration by cable operators has been steadily diminishing.[72] Further, since 1991, DBS has arrived (and thrived) and must-carry for broadcasters has been implemented successfully. Given the competition, cable operators must deliver the programming that consumers desire. Arguments about "monopsony" are out of touch with the times.

2. The Writers Guild Comments Confirm That The Flow Of Video Programming To Consumers Is Less Susceptible To Unfair Impediments By Cable Operators Than Ever Before.

The comments of the Writers Guild of America ("WGA"), while nominally supporting tight curbs on cable's horizontal growth, actually bring into sharp focus how the market is *more competitive* and the flow of video programming to the *consumer less susceptible* to unfair impediments than ever before. In attempting to characterize the

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regional networks, see id. at Table D-3, and fifty-one more networks are in the planning stages. See id. at Table D-4.

[71] S. Rep. No. 102-92, at 33 (1991).

[72] The proportion of vertically integrated non-broadcast networks is vastly reduced from a decade ago. See Eighth Annual Video Competition Report, CS Docket No. 01-129 at 66 ¶ 157 (citing "years of decline" of vertical integration). Adjusting for AT&T's divestiture of Liberty (Liberty now is integrated with only a very small cable system in Puerto Rico that provides no basis for "leverage"), vertical integration actually declined again last year, just as in each of the prior several years. Id. at n.511 ("if we did not count Liberty Media as being vertically integrated, the ratio of vertically integrated channels would decrease from 35 percent in 2000 to 31 percent in 2001"). For its part, NCTA argues that 48% of all the national cable programming services were owned by cable operators in 1992, whereas today, only 26% are vertically integrated. See NCTA at 9. Moreover, as NCTA points out, 12 of the top 15 most-watched services were vertically integrated in 1992 (an increase from 10 of 15 in 1990), whereas by 2000 only 9 of the top 20 were, and only 5 of the top 10 by 2001. Id. at 10.

video programming marketplace as captive to a cable monopoly, WGA actually proves the opposite.

WGA bemoans a market in which ninety-one "major" programming networks – reaching more than sixteen million homes each – compete to buy video programming.[73] In fact, as is already evident, there are almost three hundred national video programming networks, not including over-the-air broadcasters. Even focusing on ninety-one networks, which is hardly a small number, WGA concludes there are only twelve "owners" that separately buy programming for their owned networks. Assuming it is correct to characterize the *purchase* of video programming in this manner – which WGA does not prove – it still leaves twelve major buyers by WGA's own account.[74] This is hardly a concentrated or even rapidly concentrating market.

Finally, even if WGA is correct – which it is not – to assert that programming cannot be successful unless it is sold to one of twelve different entities,[75] little of this alleged "concentration" of buying power rests in the hands of cable operators. Of the 12 "big companies" cited by WGA, only five are affiliated with cable operators – and that includes Liberty Media, whose cable interests are negligible.[76] Zeroing in on the lead five of the "few big companies" that own most of the "major networks," it turns out that

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[73] WGA at 7-8.

[74] Id. at 7-8.

[75] Id. at 8.

[76] Id.; see also www.libertymedia.com/our_affilates/default.htm (table displaying Liberty's worldwide cable holdings and showing that Liberty's only interest in a U.S. cable operator is a 123,000-subscriber system in Puerto Rico).

only one of these five is a cable operator: AOL Time Warner.[77] So, WGA's "problem" with cable consolidation comes down to one company, and WGA targets that company *because of its programming networks, not because of its cable systems*.[78] Peeling away the rhetoric, it turns out that ownership of cable systems is simply not part of the calculus for WGA. Indeed, WGA speculates that Sony's inability to succeed in the programming business was due, not to its lack of cable systems, but to its *lack of a network*.[79]

Far from adding factual support to the rhetorical chorus of those who advocate strict horizontal caps, WGA's comments in fact confirm Comcast's thesis that Markets 2 and 3 have "collapsed" for all intents and purposes. Because cable operators, DBS providers, broadcasters, and other "must-have" non-broadcast video programming networks all compete against each other to serve viewers' interests, they have no incentive to leave their customers' wishes unfulfilled. WGA wishes there were more "buyers" competing for its members' services, but it ignores the vast number of buyers already in the market and it provides no basis upon which to conclude that regulation (particularly of cable operators) will have any effect on the interests of consumers. Finally, WGA ignores the economics of program distribution and the myriad program outlets – in this case, independent of cable control – that are available to producers of video programming who seek access to viewers. All WGA wants is for the Commission to "do something" about a "problem" that has no basis in reality or to place its members'

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[77] WGA at 10. The others are Viacom, Disney, News Corporation, and Vivendi-Universal/USA Networks. Id.

[78] See id. (discussing the problem of these entities' control over the creative process, which occurs at the network (Market 2) level, not the distribution (Market 3) level).

[79] See id. at 13.

private economic interests before the public's interest in an unimpeded flow of video programming over efficient distribution media.

Fundamentally, WGA's current arguments differ in form but not in substance from justifications for prior structural regulations (viz., the "prime time access rule" and the financial interest/syndication rule, or "fin/syn") that have failed in the broadcast context. Indeed, even here, WGA explicitly bemoans the repeal of the fin/syn rules as contributing to the "domination of the airwaves by a few behemoths."[80] Importantly, the Commission's reasons for repealing those rules – that they hobbled efficient program distribution with no countervailing benefit to consumers – are still responsive to WGA's arguments today.[81]

3. The Ever-Increasing Capacity Of Wireline And Wireless Pathways Into The Home Further Undercuts Claims Of "Monopsony" Power.

Even assuming that cable operators today could exercise "monopsony" power – individually or collectively – the inexorable trend towards increasing capacity on their

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[80] Id. at 4.

[81] The Prime Time Access Rule ("PTAR") basically prohibited NBC, ABC, and CBS from programming the 7:00 to 8:00 p.m. television time slot in order to "allow" independent producers of video programming to access the prime time market from which they would, the FCC assumed, normally be shut out by the market-power-wielding networks. Experience proved, however, that such structural regulations only misallocate resources; the PTAR resulted in nothing more than a profusion of game shows and syndicated re-runs of former network programming. See generally Thomas G. Krattenmaker, The Prime Time Access Rule: Six Commandments for Inept Regulation, 7 Hastings Comm. & Ent. L.J. 19 (1985). The financial interest and syndication rules were a related attempt at industry micro-management by the Commission that, contrary to its intended consequences, merely shifted the risks involved the production of television programming instead of causing more programming to be produced. See Schurz Communications, Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992). Advocates of strict

facilities (and others') would rapidly erode that ability. In competition with DBS providers and incumbent local exchange carriers, Comcast and other cable operators have been investing billions of dollars to upgrade their facilities and expand the capacity of their networks. When Congress passed the 1992 Cable Act, cable operators typically offered 36 channels.[82] Cable operators provide an average of eighty analog channels today, while the number of subscribers receiving more than 50 channels has doubled and the number receiving fewer than thirty channels has dropped by almost half since 1993.[83] Comcast's five-billion-dollar investment in plant upgrades is almost entirely complete, and other cable operators have likewise pressed ahead with their own upgrades. As a result, substantially expanded channel capacity and digital channel packages are being offered to subscribers in ever-increasing numbers.[84] Attempting to exercise

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ownership limits similarly confuse the shifting of profits among the "middlemen" with consumer welfare.

[82] See Comcast at 29.

[83] Id. at 29-30.

[84] Id. at 30. Over-the-air broadcasters are also going digital. "As we stated in previous reports, DTV could potentially enhance the ability of broadcasters to compete in the video marketplace." Eighth Annual Video Competition Report, CS Docket No. 01-129, at 40 ¶ 82. Digital television ("DTV") broadcasting will create thousands of new outlets for video programming to reach viewers and thereby further enhance the abundance and competitive supply of programming. Each broadcaster's additional 6 MHz of capacity can be used for multiple "channels" of video programming, and each such channel can support one hundred sixty eight hours per week (24x7) of standard-definition video programming streams. See "Digital Television Consumer Information," FCC Office of Engineering and Technology Release, November, 1998 (available at http://www.fcc.gov/bureaus/ engineering_technology). These channels will be available to almost every U.S. television household and enable each local broadcaster to become a mini-MVPD all by itself. None of the video programming decisions made by these broadcasters will be subject to the influence of any cable company, whatever its horizontal scale; on the contrary, these outlets will be dominated by the broadcast networks described above.

"monopsony" power by *reducing the purchase of video programming* below competitive levels would waste these investments. It would certainly make no sense when two DBS providers (and other facilities-based competitors) have the ability and incentive immediately to pick up the slack.[85]

C. Geographic Expansion By A Cable Operator Cannot Unfairly Impede The Flow Of Video Programming To Consumers.

If this proceeding could be characterized as having a single goal, it would be to safeguard against any unfair interference in the flow of video programming by a cable operator that is expanding its subscriber base outside a given local market.[86] The record evidence calls into question the need for strict limits on cable operators to provide such a safeguard. Beyond that, the record does not establish how geographic expansion by a cable operator could unfairly affect on the flow of video programming to consumers.

Cable operators typically do not compete with each other, either to buy or sell video programming. Nor does the purchase of video programming by one buyer automatically make it unavailable to another.[87] Thus, geographic expansion by one cable operator does not create the *ability* to interfere unfairly in the flow of video programming

[85] See TW at 13-14 (channel capacity increases make anticompetitive foreclosure unlikely); AT&T at 24-25. As the National Association of Broadcasters discusses in its Petition to Deny the merger application of Echostar and Hughes, DBS capacity is expanding and will continue to expand due to continuing progress in compression and hardware technologies as well as the launch of several new satellites. See National Association of Broadcasters Petition to Deny, CS Docket No. 01-348, at 81-90 (Feb. 4, 2002).

[86] See supra Section I.

[87] As Professor Ordover has established, video programming is "non-rival" in consumption. Ordover at 12 ¶ 26. This means that a supplier can sell its programming to as many buyers as it can without using the product up. Two buyers of such a good who merged would not necessarily change their total consumption.

to consumers. Moreover, there are many pathways by which video programming can reach consumers in the home. A cable operator that attempted unfairly to interfere with the flow of video programming to consumers would find that whatever benefit it might derive would likely be more than offset by loss of viewers to its rivals.[88] For that reason, the *incentive* to interfere unfairly in the flow of video programming to consumers does not increase as a cable operator reaches more customers, either. Therefore, neither the ability nor the incentive of a cable operator unfairly to interfere with the flow of video programming to consumers would increase *even as* its share of total nationwide customers increases. The case for strict ownership caps therefore cannot rationally be made.

III. REMAINING CONCERNS EXPRESSED ON THE RECORD DO NOT JUSTIFY STRICT OWNERSHIP LIMITATIONS.

The remaining claims made on the record in support of strict ownership limits miss the mark. Those who argue that strict limits on cable system ownership are required fail to show what precise harm to the flow of video programming is caused by multiple system ownership or how their proposed solution would "remedy" the problem, consistent with judicial mandates.[89] Others base their approach on theories or statutory interpretations that are divorced from the Commission's proper role, or which have nothing to do with horizontal ownership caps, or offer "solutions" to "problems" unrelated to multiple cable system ownership. The case for strict horizontal ownership

[88] See supra n.36 and accompanying text. See also Ordover at 59-64 ¶¶ 113-20.

[89] See Time Warner II, 240 F.3d at 1135.

limits has not been made, especially in light of the need to continue to encourage investment and innovation by cable operators.

A. CFA Has Failed To Show That The Statute Presumptively Requires Strict Ownership Limits.

CFA argues that the statutory directive to "enhance" competition leads ineluctably toward strict caps.[90] As an initial matter, it cannot be rationally argued that the marketplace today requires the same level of regulation to "enhance" competition as might conceivably have been imposed in 1992, given how substantially competition has grown in the intervening years. Moreover, Time Warner II cautions against such a knee-jerk approach.[91] Congress clearly did not dictate the number of cable companies, in *different* geographic markets, necessary to ensure competition. Had it done so, it is questionable whether the statute would have survived a facial constitutional challenge.[92] Moreover, the statutory mandate itself is flexible, as it must be to allow the Commission to carefully weigh the evidence and impose regulations that do not unduly restrict important First Amendment protections.[93]

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[90] CFA at 20. A cap on geographic extension cannot "enhance" competition in the local market. Cable systems in different geographic markets do not compete with each other, whether they are owned separately or jointly. Therefore, cable MSO geographic extension has no effect on the multichannel video choices available to individual subscribers.

[91] See Time Warner II, 240 F.3d at 1134 (requiring a dynamic analysis of the marketplace).

[92] Given the lack of evidence available to justify the Commission's prior 30% cap, it would have been difficult if not impossible for Congress to draw a "reasonable inference based on substantial evidence" that such a strict command-and-control regulation was necessary. Time Warner I, 211 F.3d at 1318.

[93] See note 3, supra.

CFA also argues that the antitrust laws mandate strict regulation by the Commission, since CFA believes a thirty percent market share is "presumed" anti-competitive under antitrust principles.[94] But there are several mistakes inherent in this analysis. To begin with, what CFA characterizes as the cable industry's "market share" does not pertain to any relevant antitrust market. Depending on the underlying data, it may have some relation to the number of households reached by cable compared to other MVPDs, but this is not a relevant antitrust "market."[95] Moreover, if antitrust precedents are clear on any one point, it is that no particular share (of a *relevant* market) can be "presumed" to reflect market power.[96] Finally, CFA is wrong to rely on *merger* cases to support its argument for *structural* regulations.[97]

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[94] CFA at 25-29 (summarizing cases).

[95] The "market" cited by CFA, as well as the "market" relevant to the Commission's analysis in its annual video competition reports, is much narrower than the relevant product market for antitrust purposes. The "MVPD market," as the Commission has defined it, excludes the dominant firms in the market for the purchase of video programming: the broadcasters. See notes 66 and 67 supra. See also Eighth Annual Video Competition Report, Separate Statement of Commissioner Martin, CS Docket No. 01-129, at 122 (with respect to the analysis of market structure and the extent of concentration, "I question whether the relevant product market is properly defined . . . . The Communications Act defines 'video programming' as 'programming provided by, or generally considered comparable to programming provided by, *a television broadcast station*. Accordingly, the report describes as 'competitors' in the market for delivery of video programming entities such as broadcasters, cable operators, and DBS operators. With no explanation, however, the section addressing 'Horizontal Issues in the Market For Delivery of Video Programming' limits the competitive analysis to only a subset of that market—the market for delivery of *multichannel* video programming") (emphasis in original).

[96] "Normally, a company's ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand , which in turn are determined by the availability of competition." Time Warner II, 240 F.3d at 1134. An analysis of market power involves examining the possibility of where consumers could turn in the event that a hypothetical monopolist attempted to raise prices. To do this, one must look at more than static market shares. CFA's reliance on FTC v. Heinz, 246 F.3d

Indeed, the antitrust laws already protect competition and there is no evidence that independent or collusive behavior by cable operators has in fact unfairly impeded the flow of video programming to consumers.[98] CFA's assertion that the antitrust laws are not intended to enhance competition[99] is just plain wrong; antitrust is the United States' well-recognized "fundamental national economic policy."[100]

B. Calling On The Commission To Displace Viewer Preferences Is A Misguided Approach.

A few commenters apparently believe that the statute requires the Commission to substitute its views (or theirs) for what viewers believe is appealing programming. This argument is framed in terms of supporting "civic discourse," or competition among ideas, or "diversity."[101] These arguments should be placed in context, as the thrust of the 1992

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708 (D.C. Cir. 2001) is particularly telling. CFA at 28. There, the D.C. Circuit upheld a preliminary injunction against a merger that would have reduced the number of competitors in a relevant market from three to two. In the market for the delivery of video programming to consumers, there are dozens of competitors. In any local market, of course, *no cable company merger would ever reduce the number of competitors* unless the merging firms each already had a system in the same market.

[97] As discussed above, CFA's reliance upon merger-related antitrust cases is misplaced since the aggregation of cable systems in separate markets does not result in "concentration" of any relevant product market. A cable system in Denver does not compete with a cable system in Detroit, and the purchase of one by the owner of the other would not decrease competition in either market.

[98] Accord Time Warner II, 240 F.3d at 1132 (noting the absence of "record support for inferring a *non-conjectural* risk of collusive behavior") (emphasis supplied).

[99] CFA at 7.

[100] See, e.g., National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378, 388 (1981); Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966).

[101] See CFA at 30-38; Comments of U.S. Conference of Catholic Bishops at 3 ("Bishops") ("meaningful" limits must "promot[e] diversity of views"); WGA at 7 ("maximum" diversity does not exist) (emphasis in original). CFA suggests that the market maximizes profits but excludes minority and unpopular views. CFA at 31. In

Act's horizontal ownership provisions is decidedly not to allow the Commission to judge what sort of video programming has "value."[102] Thus, such claims are an improper basis to justify ownership restrictions.

Moreover, in today's Internet-enabled communications environment, there is arguably more information available to more people about more questions of public import than ever before.[103] No one can deny that, in terms of access to news, information, opinions, and opportunities for robust debate on literally any issue of interest, the Internet has already eclipsed anything that was ever available from a single or multi-channel video program distributor. In light of the demonstrated growth of programming diversity over the past ten years, concerns about "undemocratic uses of

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fact, a vibrant national marketplace affords greater opportunities for programmers to find an audience for content that may have a limited appeal to smaller audiences. For example, regional or national distribution over either a clustered cable system or DBS allows for the development of quality niche programming, such as Food Network, Home and Garden Television, TechTV, or the Weather Channel, that could never be sustained economically by the demand found in any single market.

[102] See Time Warner II, 240 F.3d at 1136 ("[Congress'] statement of purpose supports a reading that sharply confines the authority to regulate solely in the interest of diversity").

[103] See, e.g., Reno v. ACLU, 521 U.S. 844 (1997) (stating that, with regard to the Internet, "at any given time tens of thousands of users are engaging in conversations on a huge range of subjects. It is no exaggeration to conclude that the content on the Internet is as diverse as human thought"). No one will disagree with the premise that robust civic discourse is an important objective in a democratic society. Regardless of its importance, however, it does not provide "carte blanche" for any manner of regulation. Record evidence as to how cable system ownership impedes such discourse is required before rules can be imposed. Contrary to CFA's claim, this does not mean "reduc[ing] civic discourse to simple economics." CFA at 30. It means providing concrete record evidence to justify Government regulations that curtail recognized First Amendment freedoms.

media market power [to pursue] the private interests of owners"[104] are out of touch with what is really happening in the market.

In today's competitive marketplace, there is a strong incentive to respond to consumers.[105] The audience measurement system provides clear and direct evidence of what viewers value.[106] No market participant has an incentive to ignore consumers; in fact, the market is extremely sensitive to viewer tastes.[107] There is no basis to impose regulatory conditions that would undermine responsiveness to consumer preferences.

For its part, WGA questions whether technology and the marketplace have increased the "diversity and variety and quality" of video programming.[108] WGA argues that increased concentration in the market for purchasing video programming has caused a reduction in the diversity of offerings to consumers.[109] In fact, however, there is *more* diversity in programming today than ever before. Countless program producers are creating content for an ever-increasing number of program outlets. As a result, video programming choices today include a rich assortment of information, entertainment, educational, cultural, and news content. Vast amounts of programming of truly exceptional quality are readily available at the touch of a button. As for diversity and

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[104] CFA at 211.

[105] See TV Networks and Ratings, from Elements of Mass Communications: An Interactive Cybertext, available at www.cybercollege.com/frtv/frtv_ind.html.

[106] Id.

[107] Comcast has no incentive to disfavor unaffiliated video programming networks. See Linda Moss, Outdoor Channel Gets Comcast Deal, Multichannel News, Jan. 28, 2002 (carriage deal for unaffiliated network that competes with affiliated network).

[108] WGA at 2.

[109] Id. at 4-7.

value, today's offerings surpass anything ever before available to television viewers. Nor does WGA suggest how the Commission would better "judge" what programming viewers should be watching, or how ownership limits alone would improve the "quality" of such programming. Surely, the Commission does not wish to pass judgment on Roots or The West Wing (both cited by WGA) as a matter of government policy – even if such an evaluation were related to the issue at hand (which it is not).

For their part, the Catholic Bishops' reflect concerns about their experiences with broadcasters, not cable operators. They argue that "[w]eakening ownership limits broke the link between the television station and the community it was licensed to serve."[110] They also argue that there are fewer public service announcements and fewer hours of public affairs programming than before. These complaints cannot be fairly directed against cable operators.

Cable operators are intimately connected to the communities they serve, and have been developing more local programming even as others have developed less. There are many examples of cable video programming designed expressly to enhance the level and quality of public discourse, from C-SPAN and C-SPAN2 to CNN, FoxNews, CNBC, and MSNBC, to the array of public, educational, and government channels routinely carried on cable systems.[111]

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[110] Bishops at 4.

[111] As for religious programming, see Bishops at 3, it is available during particular hours on many different national networks and local broadcast stations; in addition, there are several national all-religious programming networks (e.g., The Dream Network, Inspiration, Cornerstone, Trinity, Eternal Word, PraiseTV and Word Networks), and available DBS specialty networks.

Comcast does its part to contribute to civic discourse and coverage of public affairs. In addition to providing public, educational, and government ("PEG") channels, as required by local franchise authorities, Comcast produces and distributes cn8, which provides extensive and tailored local programming including news, discussions of public issues, locally and regionally focused call-in programs, regional sports coverage, and family entertainment. Today, cn8 is one of the nation's largest regional cable networks, serving 3.9 million homes in Pennsylvania, New Jersey, Delaware and Maryland. cn8 provides hour-long newscasts at 7pm and 10pm and offers a wide range of discussions of local and regional issues; as its audience has grown, so has its presence in and commitment to the communities it serves.

In many of its service areas, Comcast produces local five-minute public affairs programming such as "Local Edition" and "Newsmakers." These short programs, shown every half hour (at 0:25 and 0:55) on the channel carrying CNN Headline News, include interviews with local government officials, discussions of local and regional issues, and promotion of charitable endeavors. Comcast also provides extensive public service announcements. For example, twice a year, for approximately a week each time, Comcast presents PSAs for "Cable Positive," promoting AIDS/HIV awareness, on multiple different channels. Other public service topics are covered in other "waves" of PSAs. These include National Volunteerism Month, United Way, literacy, public health, and other topics of national and local importance.

Incidentally, Comcast's efforts in all these areas – cn8, Local Edition and Newsmakers, and PSAs (to say nothing of providing free high-speed cable Internet services to schools and libraries, community service activities, and supporting charitable enterprises) – have grown, not diminished, as Comcast's customer base has grown. Horizontal growth is not inconsistent with good citizenship. In short, there has been no weakening of the "link" between cable companies and consumers. To the contrary, the threat of losing viewers to other networks and other delivery media serves to make cable operators more attentive to local viewers' interests than ever before.

Finally, there is no basis to believe that strictly limiting multiple system ownership at any particular number would measurably "enhance" the quality or desirability (at the local level) of video programming reaching the home, or materially "improve" the flow of such programming to consumers. Commenters urging government intervention in the market have failed to explain precisely how "less concentrated" ownership would be "more" responsive to consumers. On the contrary, it can plainly be shown that clustering of cable systems in local television markets has created new local programming opportunities that enhance diversity.

C. Other Concerns Raised By Multichannel Competitors Should Readily Be Dismissed From This Proceeding.

A few commenters take the opportunity in this proceeding to restate old allegations, none of which are proven and none of which relate to horizontal ownership caps on cable operators. RCN argues that multiple system ownership creates the incentive or ability for cable operators to discriminate against new MVPD entrants.[112] Such arguments are a mere rehash of the points RCN raised in the Commission's

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[112] See RCN at 12 (providing "illustrations" that supposedly confirm theoretical concerns about "market dominant MSOs); see also Comments of Broadband Service Providers at 4-5 (arguing that cable clustering is harmful).

program access proceeding.[113] Comcast has answered them substantively there. In short, Comcast follows the law. Although there is no legal requirement to make terrestrially delivered programming services available to all competitors, Comcast does make its Comcast SportsNet service available to terrestrially delivered competitors, including RCN.[114] More important for the Commission to keep in mind, whether "large MSOs [can] disadvantage overbuild entrants due to the large programming license fee discounts and by granting exclusive contracts . . ."[115] is not a proper focus of inquiry in this proceeding. The horizontal ownership provision of the statute is intended to safeguard the flow of video programming, not to preserve the economic interests of any particular network or MVPD.

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[113] Indeed, these commenters have done nothing to show how multiple system ownership creates the incentive to discriminate. In light of the record of dynamic competition in local markets nationwide, no connection has been made between the *number* of cable systems one operator owns and the *incentive* or *ability* of that operator to discriminate against a competitor.

[114] One group of commenters try to impugn Comcast's motives by citing, yet again, a four-year-old magazine article that mischaracterized the views of Brian Roberts, Comcast's president. The New Establishment: Vanity Fair's Third Annual 50 Leaders of the Information Age, Vanity Fair, Oct. 1997 at 166. The Commission has already declined to find this article relevant or reflective of any unfair practice by Comcast. See DirecTV v. Comcast, 15 FCC Rcd at 22807 ¶¶ 11-12. Mr. Roberts has denied making the statement attributed to him. See The Status of Competition Among Video Delivery Systems: Hearing Before the House Subcommittee on Telecommunications, Trade, and Consumer Protection, 105th Cong. 47 at 134 (1997) (statement of Brian L. Roberts). After four years and several proceedings, no contrary evidence has ever been adduced. Most importantly, the Commission has found that sound and legitimate business reasons motivated Comcast SportsNet's decision to deliver its service terrestrially.

[115] FNPRM at 17 ¶ 30.

D. No Commenter Has Provided Substantial Grounds For Excusing The Commission From Its Obligation To Promote Investment And Innovation In The Marketplace.

Given the lack of any demonstrated need for restrictive horizontal ownership requirements, it is all the more important for the Commission to ensure that it takes no steps that would interfere with the ability of the marketplace to respond to consumers through innovation and investment. As Comcast pointed out in its initial comments, Congress instructed the Commission in considering ownership rules to take account of the dynamic nature of the communications marketplace.[116] Innovation is an essential aspect of this dynamism. Even if there were a serious risk that cable ownership would threaten the flow of video programming in a competitively relevant way – and none has been demonstrated – "the Commission would need to weigh that public interest harm against the substantial benefits associated with increased system ownership."[117]

There are clear and substantial public interest benefits to increased system ownership, including better service at lower costs to customers.[118] And increased system ownership promotes the statutory objective of encouraging widespread deployment of advanced telecommunications services to all consumers as well as advanced digital services, expanded channel capacity (which promotes video programming diversity), and the introduction of viewing enhancements such as SVOD, HDTV, and ITV.[119] Large MSOs are clearly those most able to make the investments necessary to offer these

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[116] Comcast at 33. See also NCTA at 16 (citing S. Rep 102-92, at 33; H. Rep. 102-628, at 43).

[117] AT&T at 69.

[118] Ordover at 69 ¶ 129.

[119] Id. at 70 ¶ 132.

services, not only due to scale and scope economies, but also because of access to capital and the ability to undertake sophisticated research and development.[120] Liberalized ownership rules may also enable cable operators with complementary assets to combine, bringing consumer benefits through accelerated upgrades, more rapid introduction of new services, enhanced local and regional program offerings, and higher service quality. Plainly, any ownership rules that fail to account for these efficiencies would not comply with the Commission's statutory responsibilities.[121]

IV. THE RECORD PRECLUDES THE COMMISSION FROM REINSTATING ITS NOW-VACATED DECISIONS REGARDING THE ATTRIBUTION RULES.

If the record evidence supporting strict ownership caps is lacking (and it is), the case for tightening attribution rules is even weaker. The Court of Appeals *reversed and remanded* the Commission's decisions regarding cable ownership rules, but it *vacated* specific portions of the Commission's attribution rules.[122] As to those rules, the first-round comments provide no credible basis for altering the *status quo*.

With respect to the single majority shareholder exemption from the attribution rules, the Court recognized the prevailing understanding that a "minority shareholder would ordinarily not be able to direct the affairs of [a] company" that has a single majority shareholder.[123] Accordingly, it found that a decision to eliminate that exemption "requires some affirmative justification . . . yet the Commission effectively offers

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[120] AT&T at 69. See also PFF at 16.

[121] See NCTA at 15-17.

[122] Time Warner II, 240 F.3d at 1128.

[123] Id. at 1142.

none."[124] The first-round comments adduce neither "experience nor reason"[125] that fills this vacuum. There is "no sound theoretical or empirical basis to eliminate the 'single majority shareholder' exemption."[126] The now-reinstated exemption must stand.

The record is conclusive with regard to the rules regarding insulation of limited partnership interests as well. Once the holder of a limited partnership interest has certified compliance with each of seven separate insulation requirements that "ensure that the partner 'will not be materially involved in the media management or operations of the partnership,'"[127] and has specifically "certified that it does not 'communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its video programming business,'"[128] it is senseless to attribute the limited partnership interest to a vertically integrated MSO that also sells programming to the partnership. In light of the other preconditions for insulation, there is just "no rational relation . . . between the sale of programming and the ability of a limited partner to control programming choices."[129] Real-world experience validates this view, as does the first-round record.

Accordingly, the Commission should keep the single majority shareholder exemption and should not reinstate the no-program-sale embellishment to the limited partnership insulation criteria.

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[124] Id. at 1143 (internal citation omitted).

[125] See id.

[126] AT&T at 77.

[127] Time Warner II, 240 F.3d at 1143 (quoting the Commission).

[128] See id. (quoting the Commission).

[129] Id. See AT&T at 71-77 (the no-sale rule is irrational and inconsistent with Commission precedent).

CONCLUSION

In its initial comments, Comcast urged the Commission to follow the dictates of the D.C. Circuit's construction of the governing statute, to focus on the dynamics of ever-increasing competition, innovation, and risk, and to encourage continued investment and innovation as cable operators provide a growing array of facilities-based, broadband services. The comments filed by other parties provide considerable support for all of these positions. By contrast, the few substantive comments by proponents of strict ownership limits on cable operators utterly fail to demonstrate concrete, non-conjectural reasons why horizontal ownership limits are required to prevent unfair impediments in the flow of video programming to consumers.

As noted at the outset, Comcast does not take the position that the Commission cannot lawfully adopt any ownership limit. Any such rule, however, must take account of an environment in which cable operators compete with a wide range of massive, sophisticated and well-financed entities such as Viacom, Disney, General Electric, SBC, EchoStar, DirecTV and others in a dynamic market for the packaging and distribution of video programming to consumers. In today's marketplace, innovation, expanding service offerings, and ever-increasing competition are facts of life. At most, the record evidence can support only minimally restrictive ownership rules, and these rules may not unreasonably attribute interests that should not be attributed.

Respectfully Submitted,

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Exhibit A

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